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No. 603

In the Supreme Court of the United States

OCTOBER TERM, 1941

JOHN C. CURRY, INDIVIDUALLY AND AS COMMISSIONER OF REVENUE OF THE STATE OF ALABAMA, PETITIONER

v.

THE UNITED STATES OF AMERICA, DUNN CONSTRUCTION CO., INC., AND JOHN S. HODGSON AND COMPANY, PARTNERS DOING BUSINESS AS DUNN CONSTRUCTION COMPANY, INC., AND JOHN S. HODGSON AND COMPANY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALABAMA

BRIEF FOR THE UNITED STATES

INDEX

CITATIONS

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OPINION BELOW

The Circuit Court of Montgomery County, Alabama, delivered no opinion; its decree is found at R. 124–125. The opinion of the Supreme Court of Alabama (R. 131) is reported in 3 So. (2d) 582.

JURISDICTION

The judgment of the Supreme Court of Alabama was entered on July 29, 1941 (R. 130). The peti-

tion for a writ of certiorari was filed on September 11, 1941, and was granted on October 13, 1941. The jurisdiction of this Court is conferred by section 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the United States in storing and using goods is subject to the Alabama tax on the storage, use, or other consumption of tangible personal property.

2. Whether the immunity of the United States, if it exists, is retained when the United States stores and uses property through a cost-plus-a-fixed-fee contractor.[1]

STATUTES INVOLVED

The relevant portions of the statutes are set out in the Appendix, *infra,* pp. 16–20.

STATEMENT

The facts were in large part stipulated and may be summarized as follows:

1. *This Litigation.* On May 8, 1941, the Department of Revenue of the State of Alabama, pursuant to Act No. 67 of the General Acts of Alabama, 1939 (Appendix, *infra,* pp. 16–20), made a

[1] A third question, as to the territorial jurisdiction of the State to impose the tax, was argued but not decided below and need not be considered here (see Brief for the United States in *Alabama* v. *King & Boozer*, No. 602, this Term, pp. 26–27, n. 1).

final assessment of tax in the amount of $51.12, inclusive of penalty and interest, upon Dunn Construction Company, Inc., and John S. Hodgson and Company, partners trading as Dunn Construction Company, Inc., and John S. Hodgson and Company,[2] with respect to the storage, use, or consumption of tangible personal property purchased outside of Alabama, or in interstate commerce, for storage, use, or consumption in the State, during the quarterly period beginning January 1, 1941, and ending March 31, 1941.

After payment by Dunn & Hodgson under protest (R. 9–12), the United States and Dunn & Hodgson on May 16, 1941, commenced a suit in equity in the Circuit Court of Montgomery County, Alabama (R. 41–48), against John C. Curry, individually and as Commissioner of Revenue of the State of Alabama, for a declaratory judgment determining the tax liability of Dunn & Hodgson and a decree ordering refund of the tax paid by them, together with the penalty and interest thereon, with interest. The amended bill of complaint alleged that the assessment of May 8, 1941, was based upon the sales price of tangible personal property purchased outside the State of Alabama, consisting of roofing materials purchased by the United States, or by Dunn & Hodgson as an agent and instrumentality of the United States and in connection with the performance of

[2] The partnership is hereafter called Dunn & Hodgson.

their contract with the United States, and stored, used, or consumed by the United States, or by Dunn & Hodgson as an agent and instrumentality of the United States in and about the construction by them, for and on behalf of the United States, of certain buildings, warehouses, and other camp and military facilities at Fort McClellan, Alabama, under their contract with the United States. The bill prayed that the assessment be held void on the ground, among others, that the storage, use, and consumption of the materials were immune under the Constitution of the United States from taxation by the State (R. 46–47).

The Commissioner of Revenue filed a demurrer and an answer to the complaint, alleging, *inter alia*, that the assessment was valid on the grounds that the storage, use, or consumption of property was not by the United States or for or on its behalf but was by an independent contractor which was not such an agent or instrumentality of the United States as would entitle it to claim any immunity from tax, and that the United States in the contract with the contractor consented to the tax and waived any immunity from it (R. 49–62).

On June 13, 1941, the Circuit Court decreed valid the tax assessment made by the Department of Revenue on May 8, 1941 and held that Dunn & Hodgson were not entitled to refund (R. 124–125). The United States and Dunn & Hodgson appealed to the Supreme Court of Alabama. That court on

July 29, 1941, reversed, with one judge dissenting (R. 130–132).

2. *The Dunn & Hodgson Contract in General.* On September 9, 1940, the United States of America entered into a contract with Dunn & Hodgson for the construction of a complete tent camp, including the necessary buildings, temporary structures, utilities, and appurtenances thereto, at Fort McClellan, Alabama. The contract was in effect during the period January 1, 1941, to March 31, 1941, covered by the assessment of tax involved in the present case (R. 63). The provisions of this contract are summarized in the Brief for the United States in *Alabama* v. *King & Boozer,* No. 602, October Term, 1941, at pp. 4–15.

3. *Acquisition of the Materials Involved in this Case.* It is stipulated (R. 64–65) that all of the tangible personal property with respect to the storage, use or consumption of which the tax assessment was made in this case was purchased, shipped, delivered, paid for, stored, used, or consumed and reimbursement therefor made in substantially the same manner as hereinafter set forth concerning certain roofing material purchased from the Certain-teed Products Corporation, of Atlanta, Georgia.

It is agreed that the Certainteed Products Corporation and the other vendors of tangible personal property with respect to which tax assessment was made in this case maintain no place of

business in the State of Alabama and have paid no sales or use tax with respect to the sale, storage, use, or consumption of that property (R. 68).

Prior to January 15, 1941, the Certainteed Corporation submitted a proposal to Dunn & Hodgson to sell a quantity of roofing material at a stipulated price, for use by Dunn & Hodgson in the performance of their contract with the United States of September 9, 1940. The proposal was submitted by Dunn & Hodgson to the Constructing Quartermaster at Fort McClellan, Alabama, for approval, and was approved by him (R. 65).

Pursuant to the proposal submitted by the Certainteed Products Corporation, the contractor on January 15, 1941, prepared and submitted to the Constructing Quartermaster a request for purchase of the material, and requested approval by the Constructing Quartermaster of the purchase. His approval was then endorsed on the request for purchase (R. 65).

Thereafter, on January 16, 1941, the contractor submitted to the Certainteed Corporation, at Atlanta, Georgia, an order for the roofing (R. 65). This order was signed by the purchasing agent of the contractor, and directed that the materials described in the order should be shipped to "United States Constructing Quartermaster, at Fort McClellan, Ala. For account of Dunn Construction Co., Inc., and John S. Hodgson & Co." (R. 65, 71). The purchase order provided (R. 72):

> This order is placed for the benefit of, and is assignable to, the United States Government.
>
> This Purchase Order does not bind, nor purport to bind, the United States Government or Government officers thereunder.
>
> Terms of Payment as stated on obverse side of this Purchase Order are understood to be effective upon arrival at destination and acceptance of material by properly accredited U. S. Government officers or representatives having jurisdiction over same and of properly executed Bills of Lading (or shipping papers) and receipt of certified invoice.

The purchase order also directed that copies of the invoice should be properly filled out by the seller and certified as follows (R. 72):

> I certify that the above bill is correct and just; that payment therefor has not been received; * * * and that State or local sales taxes are not included in the amounts billed.

Upon receipt of the purchase order, the Certainteed Corporation shipped the roofing material by freight from Atlanta, Georgia (R. 65). On January 20, 1941, the material arrived at Fort McClellan, Alabama, on Southern Railway car 13975, which was placed at a siding within the Fort, where the material was then unloaded from the car (R. 66). At the time of unloading, the material was checked and inspected, and two re-

ports were made (R. 66). One report was made to the Constructing Quartermaster and the other to Dunn & Hodgson; each was signed by an employee of the contractor and by an employee of the United States representing the Constructing Quartermaster, and each verified the receipt and inspection of the specified quantity of roofing material (R. 73–74).

The property, after unloading from the railway car at Fort McClellan, Alabama, was stored in a general warehouse which belonged to the United States and is located within Fort McClellan (R. 66, 73); the warehouse was used for the storage of materials purchased in connection with the performance of the Dunn & Hodgson contract with the United States (R. 66). When the contractor required the materials concerned in this case, they were withdrawn from the warehouse and used in the construction work in performance of the contract (R. 66).

On February 8, 1941, Dunn & Hodgson received from the Certainteed Products Corporation the original invoice for the roofing material described in the purchase order of January 16, 1941 (R. 66, 74). On February 20, 1941, this invoice, along with others not involved in this case, was transmitted to the Constructing Quartermaster at Fort McClellan, Alabama, for his approval for payment by the contractor (R. 66, 75–76). The Constructing Quartermaster then approved the invoice for payment (R. 66, 75).

Thereafter, Dunn & Hodgson issued their joint check to the Certainteed Products Corporation in full payment of the invoice mentioned above, in the amount of $221.72, being the amount of $226.25 less two percent discount, which check, upon presentation, was paid in due course (R. 66–67).

On March 5, 1941, the contractor submitted a voucher to the United States War Department, through the Constructing Quartermaster at Fort McClellan, for reimbursement for expenditures by it aggregating $9465.76, including its expenditure of $221.72 made to the Certainteed Products Corporation (R. 67, 76–77). Neither the check nor the voucher included any amount for Alabama sales or use tax with respect to the roofing material purchased (R. 67). The contractor attached to its voucher the approved request made to the Constructing Quartermaster for the purchase of the roofing, copies of its purchase order to the Certainteed Corporation, the two receiving and inspection reports, and the invoice of Certainteed (R. 67–68).

The Field Auditor of the Constructing Quartermaster and the Constructing Quartermaster approved the voucher for payment, and on March 11, 1941, it was paid by the Finance Officer at Fort McClellan to the contractor through a United States Government check (R. 67).

Dunn & Hodgson made no return to the Department of Revenue of the State of Alabama of the sales price of the purchased materials, the storage,

use, or consumption of which is asserted by petitioner to have been subject to tax under the Alabama statute of 1939 (R. 68). It has made demand upon the United States through the Constructing Quartermaster and the Quartermaster General for reimbursement to it for the amount of tax paid by it under protest to the State after assessment (R. 69).

ARGUMENT

I

THE ALABAMA USE TAX IS IMPOSED UPON THE USER

The use tax is levied by Alabama Laws of 1939, Act No. 67. Section II of that Act (*infra*, p. 16) provides:

> * * * (a) An excise tax is hereby imposed on the storage, use, or other consumption in this state of tangible personal property purchased at retail on or after the effective date of this act, for storage, use, or other consumption in this state at the rate of two percent (2%) of the sales price of such property, * * *. (b) * * * Every person storing, using, or otherwise consuming in this State tangible personal property purchased at retail shall be liable for the tax imposed by this act, and the liability shall not be extinguished until the tax has been paid to this State; * * *.

The tax, then, is an excise on the storage, use, or consumption of goods, measured by the retail sales price. The statute denominates the user as the taxpayer, making him liable for the tax. Sec-

tion VI requires him to file a return with the State Department of Revenue and to accompany the return with a remittance of the amount of tax due for the period covered by the return.[3] From the foregoing, it cannot be doubted that the use tax is imposed by the Act on the person who uses the goods purchased.

II

THE UNITED STATES IN STORING AND USING TANGIBLE PERSONAL PROPERTY IS IMMUNE FROM USE TAX

Our argument on this score is developed in the brief for the United States in *Alabama* v. *King & Boozer,* No. 602, this Term, pp. 36–81. It is fully applicable here: The problem of the use tax, as that of the sales tax, presents a question of constitutional immunity because it arises in the silence of Congress. Here, as in the *King & Boozer* case, the problem admits of ready solution under the guiding principle that the United States is immune from any tax imposed upon and paid by the Government itself. As that immunity includes a sales tax, it includes, *a fortiori,* a use tax collected directly from the consumer of the goods.

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[3] Sections IV and V of the Act provide for collection of the use tax through the retail *seller* in some circumstances, which, however, are not present in this case. Where they do exist, the seller is, nevertheless, required to collect the tax from the user and is forbidden to advertise absorption or rebates. Thus in situations where these statutory sections are operative, the legal incidence of the use tax is still on the user. This point is analyzed with respect to similar provisions of the Alabama sales tax in the brief for the United States in *Alabama* v. *King & Boozer*, No. 602, this Term, pp. 27–36.

In our *King & Boozer* brief we point out (pp. 70–80) that our case is in truth stronger than indicated by the assumption that Congress had been entirely silent on the question. The *indicia* of congressional intention there detailed are equally applicable here. The acts immunizing government corporations from taxation (*King & Boozer* brief, pp. 74–76) apply equally to use taxes imposed upon those corporations. The Act of October 9, 1940, relating to state sales taxation within the government reservations (*King & Boozer* brief, pp. 76–77) also authorizes the collection of use taxes, except that there should be no "collection of any tax on or from the United States or any instrumentality thereof, or the levy or collection of any tax with respect to * * * storage, or use of tangible personal property sold by the United States or any instrumentality thereof." So, too, the congressional policy as evidenced by the congressional acquiescence in the procurement practice of not paying state sales taxes and by the exemptions in federal excise statutes in favor of articles sold for the exclusive use of the United States or a state (*King & Boozer* brief, pp. 78–80) is equally persuasive here. Congress can hardly have intended an exemption from state sales taxes without a correlative exemption from compensating use taxes,[4] particularly since the use tax is ordinarily collected directly from the consumer.

[4] The compensatory character of the use tax involved in this case is apparent from the exemption contained in section

III

THE IMMUNITY OF THE UNITED STATES IS NOT LOST WHEN IT STORES OR USES GOODS THROUGH A COST-PLUS CONTRACTOR

We have shown that the Alabama use tax is imposed upon the user, and that the United States in storing and using goods is immune from such a tax. There remains to be considered only whether the immunity which would otherwise exist disappears when the United States acts in part through a cost-plus-a-fixed-fee contractor rather than through the regular procurement and operating branches of the Government.

The brief for the United States in *Alabama* v. *King & Boozer,* No. 602, this Term, develops in detail the general status of the cost-plus contractor (pp. 81–86), the terms of the contract (pp. 86–91), and the procurement practice of the parties (pp. 91–94). Here, as in that case (pp. 94–96), whatever characterization be applied to Dunn & Hodgson, the goods were used and stored on behalf of and by the United States and not the contractor.

The roofing material was shipped direct from the Certainteed Corporation, at Atlanta, Georgia, to the United States Constructing Quartermaster at

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III (a) of the statute (*infra*, Appendix, p. 16), and has been maintained in an opinion of the Attorney General of Alabama, dated October 4, 1939 (Prentice-Hall, State and Local Tax Service, par. 23,065) and in a ruling of the State Department of Revenue of Alabama, dated October 24, 1940 (*Id.*, par. 23,072).

Fort McClellan (R. 65). During the interval Dunn & Hodgson had no possession of the goods in Alabama. The unloading from the railway car occurred at a siding, within the Fort, and the goods were directly stored in a warehouse belonging to the United States after Goverment checking and inspection (R. 66). The goods were removed from the warehouse only when they were needed in the construction work, and were then used in performance of the Dunn & Hodgson contract in building the tent camp for the Government (R. 66). From these events it seems clear that the storage and use were those of the United States. Dunn & Hodgson did not independently control the shipment of the roofing, and acted at all points of the acquisition under the supervision of the Contracting Officer through the Constructing Quartermaster; the contractor never owned the roofing and was not at liberty to dispose of it in any manner except as directed by the United States. On the other hand, the Government had full dominion, and could have put the property to any use it chose, at Fort McClellan or elsewhere. In short, the contractor served only as a means, employed for mechanical convenience, through which the United States effected the storage and use of the roofing material for its own purposes.

In this case, then, precisely as in the *King & Boozer* case, the realities of the transaction, the necessities of the Government's operation, and the applicable legal principles demonstrate that the

Alabama storage and use tax, as applied to the cost-plus contractor, is in reality imposed upon the Government and is, therefore, invalid (see *King & Boozer* brief, pp. 97–105). And there has been no more of a waiver by the United States of its immunity with respect to use and storage taxes collected through the cost-plus contractor than there has been with respect to the sales taxes (see *King & Boozer* brief, pp. 109–117).

CONCLUSION

The Alabama use tax is imposed on the user. The United States in storing and using tangible personal property is immune from a state use tax. The Government's immunity is not lost because it acts in part through a cost-plus-a-fixed-fee contractor. The Alabama use tax cannot, therefore, be imposed with respect to the goods acquired by the United States through Dunn & Hodgson, stored by the United States, and used by Dunn & Hodgson in the performance of its construction contract with the United States. It is accordingly respectfully submitted that the decision below should be affirmed.

CHARLES FAHY,
Acting Solicitor General.
SAMUEL O. CLARK, JR.,
Assistant Attorney General.
WARNER W. GARDNER,
LEONARD C. MEEKER,
Attorneys.

OCTOBER 1941.

APPENDIX

The Acts of June 13, 1940, 54 Stat. 350, 360–361, and of July 2, 1940, 54 Stat. 712, are reprinted in Appendix A of the Brief for the United States in *Alabama* v. *King & Boozer*, No. 602, this Term, pp. 119–121.

General Acts of Alabama, Regular Session and Special Session, 1939, Act No. 67:

> SECTION II. (a) An excise tax is hereby imposed on the storage, use, or other consumption in this state of tangible personal property purchased at retail on or after the effective date of this act, for storage, use, or other consumption in this state at the rate of two per cent (2%) of the sales price of such property, except as provided in subsection (b) of this section. * * * Every person storing, using, or otherwise consuming in this State tangible personal property purchased at retail shall be liable for the tax imposed by this act, and the liability shall not be extinguished until the tax has been paid to this State; * * *
>
> SECTION III. EXEMPTIONS. The storage, use, or other consumption in this State of the following tangible personal property is hereby specifically exempted from the tax imposed by this act: (a) Property, the gross proceeds of sales of which are required to be included in the measure of the tax imposed * * * by the provisions of House Bill 82 approved February 8, 1939 and known as "An Act to Further Provide for the General Revenue of the State of Alabama." (b) Property, the storage, use, or

other consumption of which this state is prohibited from taxing under the constitution or laws of the United States of America or under the constitution of this state. * * *

* * * * *

SECTION VI. The tax imposed by this act shall be due and payable to the Department quarterly on or before the twentieth day of the month next succeeding each quarterly period during which the storage, use or other consumption of tangible personal property became taxable hereunder, the first of such quarterly periods being the period commencing with the first day of March, 1939, and ending the thirtieth day of June, 1939. * * * Every person purchasing tangible personal property, the storage, use or other consumption of which is subject to the tax imposed by this act, and who has not paid the tax due with respect thereto to a seller required or authorized hereunder to collect the tax, shall on or before the twentieth day of the month following the close of the first quarterly period as above defined, and on or before the twentieth day of the month following each subsequent quarterly period of three months, file with the department a return for the preceding quarterly period in such form as may be prescribed by the department showing the total sales price of the tangible personal property purchased by such person, the storage, use or other consumption of which became subject to the tax imposed by this act during the preceding quarterly period, and with respect to which the tax was not paid to a seller required or authorized hereunder to collect the tax, and such other information as the

department may deem necessary for the proper administration of this act. The return shall be accompanied by a remittance of the amount of tax herein imposed and not paid to a seller required or authorized hereunder to collect the tax during the period covered by the return. * * * Returns shall be signed by the person liable for the tax or his duly authorized agent but need not be verified by oath. * * *

* * * * *

SECTION IX. If any person neglects or refuses to make a return required to be made by this act, the department shall make an estimate for the period or periods in respect to which such person failed to make a return, based upon any information in its possession or that may come into its possession, of the amount of the total sales price of tangible personal property sold or purchased by such person, the storage, use or other consumption of which in this State is subject to the tax imposed by this act, and upon the basis of said estimate compute and determine the amount required to be paid to the State, adding to the sum thus arrived at a penalty equal to ten per cent (10%) thereof. All amounts determined to be due under the provisions of this Section shall bear interest at the rate of one-half of one per cent (½ of 1%) per month, or fraction thereof, from the twentieth day after the close of the period or periods, as the case may be, for which such amounts were required to be reported to the department until paid. * * * Promptly thereafter the department shall give to such person written notice of such estimate, determination and penalty, * * *

* * * * *

SECTION XXIV. No injunction or writ of mandate, or other legal or equitable process shall issue in any suit, action, or proceeding in any court against this State or against any officer thereof to prevent or enjoin under this act the collections of any tax or any amount of tax herein required to be collected; but after payment of any such tax or any such amount of tax herein required to be collected under protest, duly verified and setting forth the grounds of objection to the legality thereof, the retailer or person making the payment may bring an action against the Commissioner of Revenue in the Circuit Court of Montgomery County, Alabama, in equity, praying a declaratory judgment determining his tax liability for the amount so paid or his rights to a refund thereof. From the decree of the Circuit Court either the Commissioner or the person making the payment may appeal direct to the Supreme Court within thirty days and such appeal shall be a preferred case. Upon the rendition of any final judgment declaring that the person making the payment is entitled to a refund thereof, either in whole or in part, then it shall be the duty of the State Comptroller or other proper officer upon presentation of a certified copy of such final decree to issue his warrant in favor of such person for the sum determined to be due together with interest at six (6%) per cent per annum. No such action may be instituted more than one year after the tax or the amount herein required to be collected and paid to the State becomes due and payable, and failure to bring suit within said one year shall constitute waiver of any and all demands against the State on account of alleged overpayments here-

under. In no case shall any judgment be rendered in favor of the plaintiff in any action brought against the Commissioner to recover any amount paid hereunder when such action is brought by or in the name of an assignee of the seller or other person paying said amount, or by any person other than the person who has paid such amount.

SECTION XXV. Any seller or other person failing or refusing to furnish any return hereby required to be made, or failing or refusing to furnish a supplemental return or other data required by the department, or rendering a false or fraudulent return, shall be guilty of a misdemeanor and subject to a fine of not exceeding five hundred dollars ($500) for each such offense. * * *

SECTION XXVI. Any violation of the provisions of this act, except as otherwise herein provided shall be a misdemeanor and punishable as such.

U. S. GOVERNMENT PRINTING OFFICE: 1941

SUPREME COURT OF THE UNITED STATES.

No. 602.—October Term, 1941.

State of Alabama, Petitioner,
vs.
King and Boozer, a Partnership composed of Tom Cobb King and Simon Elbert Boozer, and United States of America.

On Writ of Certiorari to the Supreme Court of the State of Alabama.

[November 10, 1941.]

Mr. Chief Justice Stone delivered the opinion of the Court.

Respondents, King and Boozer, sold lumber on the order of "cost-plus-a-fixed-fee" contractors for use by the latter in constructing an army camp for the United States. The question for decision is whether the Alabama sales tax, with which the seller is chargeable, but which he is required to collect from the buyer, infringes any constitutional immunity of the United States from state taxation.

The Alabama statute, Act No. 18, General Acts of Alabama, 1939, expressly made applicable to sales of building materials to contractors, § I(j), lays a tax of 2 per cent on the gross retail sales price of tangible personal property. While in terms, § II, the tax is laid on the seller, who is denominated the "taxpayer", by § XXVI it is made the duty of the seller "to add to the sales price and collect from the purchaser the amount due by the taxpayer on account of said tax."

Section VII provides that when sales are made on credit the tax is payable as and when the collection of the purchase price is made. The Supreme Court of Alabama has construed these provisions as imposing a legal obligation on the purchaser to pay the tax which the seller is required to add to his sales price and to collect from the purchaser upon collection of the price, whether the sale is for cash or on credit. See *Lone Star Cement Corp.* v. *State Tax Commission*, 234 Ala. 465; *Long* v. *Roberts*, 234 Ala. 570; *National Linen Service Corp.* v. *State Tax Commission*, 237 Ala. 360; *Wood Preserving Corp.* v. *State Tax Commission*, 179 So. 254. Section V excludes from the tax the proceeds of sales which the state is

prohibited from taxing by the Constitution or laws of the United States.

Respondents, King and Boozer, who furnished the lumber in question on the order of the contractors, appealed to the state circuit court from an assessment of the tax by the state department of revenue, on the ground that the tax is prohibited by the Constitution because laid upon the United States, and is excluded from the operation of the taxing statute by its terms. The United States was permitted to intervene and joined in these contentions.

The trial upon a stipulation of facts, embodying the relevant documents, resulted in a decree sustaining the tax which the Supreme Court of Alabama reversed, 3 So. (2d) 572. Apart from the constitutional restriction, it found no want of authority in the taxing statute for the collection of the tax from the contractors. But it concluded that although the contractors were indebted to the seller for the purchase price of the lumber, they were so related by their contract to the Government's undertaking to build a camp, and were so far acting for the Government in the accomplishment of the governmental purpose, that the tax was in effect "laid on a transaction by which the United States secures the things desired for governmental purposes", so as to infringe the constitutional immunity, citing *Panhandle Oil Co.* v. *Knox*, 277 U. S. 218; *Graves* v. *Texas Co.*, 298 U. S. 393. We granted certiorari, 314 U. S. —, the question being one of public importance.

Congress has declined to pass legislation immunizing from state taxation contractors under "cost-plus" contracts for the construction of governmental projects.[1] Consequently the participants in the present transaction enjoy only such tax immunity as is afforded by the Constitution itself, and we are not now concerned with the extent and the appropriate exercise of the power of Congress to free such transactions from state taxation of individuals in such circumstances that the economic burden of the tax is passed on to the national government. The Government, rightly we think, disclaims any contention that the Constitution, unaided by Congressional legislation, prohibits a tax exacted from the contractors merely because it is passed on economically, by the terms of the contract or otherwise, as a part of the construction cost to the Government. So far as such a nondiscriminatory

[1] See proposed Senate Amendment No. 120, to H. R. 8438, which became the Act of June 11, 1940, 54 Stat. 265; Cong. Rec., 76th Cong., 3rd Sess., Vol. 86, Part 7, pp. 7513-19, 7527-7535, 7648.

state tax upon the contractor enters into the cost of the materials to the Government, that is but a normal incident of the organization within the same territory of two independent taxing sovereignties. The asserted right of the one to be free of taxation by the other does not spell immunity from paying the added costs, attributable to the taxation of those who furnish supplies to the Government and who have been granted no tax immunity. So far as a different view has prevailed, see *Panhandle Oil Co.* v. *Knox, supra; Graves* v. *Texas Co., supra,* we think it no longer tenable. See *Metcalf & Eddy* v. *Mitchell,* 269 U. S. 514; *Trinityfarm Co.* v. *Grosjean,* 291 U. S. 466; *James* v. *Dravo Contracting Co.,* 302 U. S. 134, 160; *Helvering* v. *Gerhardt,* 304 U. S. 405, 416; *Graves* v. *New York ex rel. O'Keefe,* 306 U. S. 466.

The contention of the Government is that the tax is invalid because it is laid in such manner that, in the circumstances of this case, its legal incidence is on the Government rather than on the contractors who ordered the lumber and paid for it, but who, as the Government insists, have so acted for the Government as to place it in the role of a purchaser of the lumber. The argument runs: the Government was a purchaser of the lumber, and but for its immunity from suit and from taxation, the state applying its taxing statute could demand the tax from the Government just as from a private individual who had employed a contractor to do construction work upon a like cost-plus contract.

The soundness of this conclusion turns on the terms of the contract and the rights and obligations of the parties under it. The taxing statute, as the Alabama courts have held, makes the "purchaser" liable for the tax to the seller who is required "to add to the sales price" the amount of the tax and collect it when the sales price is collected, whether the sale is for cash or on credit. Who, in any particular transaction like the present, is a "purchaser" within the meaning of the statute, is a question of state law on which only the Supreme Court of Alabama can speak with final authority. But it seems plain, as the Government concedes and as we assume for present purposes, that under the provisions of the statute the purchaser of tangible goods who is subjected to the tax measured by the sales price is the person who orders and pays for them when the sale is for cash or who is legally obligated to pay for them if the sale is on credit. The Government's contention is that it has a constitutional immunity from state taxation

on its purchases and that this was sufficiently a Government purchase to come within the asserted immunity.

As the sale of the lumber by King and Boozer was not for cash the precise question is whether the Government became obligated to pay for the lumber and so was the purchaser whom the statute taxes, but for the claimed immunity. By the cost-plus contract the contractors undertook to "furnish the labor, materials, tools, machinery, equipment, facilities, supplies not furnished by the Government, and services, and to do all things necessary for the completion of" the specified work. In consideration of this the Government undertook to pay a fixed fee to the contractors and to reimburse them for specified expenses including their expenditures for all supplies and materials and "state or local taxes . . . which the contractor may be required on account of his contract to pay". The contract provided that the title to all materials and supplies for which the contractors were "entitled to be reimbursed" should vest in the Government "upon delivery at the site of the work or at an approved storage site and upon inspection and acceptance in writing by the Contracting Officer". The Government reserved the right to furnish any and all materials necessary for completion of the work, to pay freight charges directly to common carriers and "to pay directly to the persons concerned all sums due from the Contractor for labor, materials or other charges". Upon termination of the contract by the Government it undertook to "assume and become liable for all obligations . . . that the Contractor may have theretofore in good faith undertaken or incurred in connection with said work and in accordance with the provisions of this contract".

A section of the contract, designated as one of several "special requirements", stipulated that contractors should "reduce to writing every contract in excess of two thousand dollars ($2,000) made by him for the purpose of the work hereunder for services, materials, supplies . . . ; insert therein a provision that such contract is assignable to the Government; make all such contracts in his own name, and not bind or purport to bind the Government or the Contracting Officer thereunder". While this section refers to contracts in excess of $2,000, we think all the provisions which we have mentioned, read together, plainly contemplate that the contractors were to purchase in their own names and on their own credit all the materials required, un-

less the Government should elect to furnish them; that the Government was not to be bound by their purchase contracts, but was obligated only to reimburse the contractors when the materials purchased should be delivered, inspected and accepted at the site.

The course of business followed in the purchase of the lumber conformed in every material respect to the contract. King and Boozer submitted to the contractors in advance a proposal in writing to supply as ordered, at specified prices, all the lumber of certain description required for use in performing their contract with the Government. The contractors, after procuring approval by the contracting officer of the particular written order for lumber with which we are presently concerned, placed it with King and Boozer on January 17, 1941. It directed shipment to the Construction Quartermaster at the site "for account of" the contractors and stated "this purchase order does not bind, nor purport to bind, the United States Government or Government officers". King and Boozer thereupon shipped the lumber ordered by the contractors by contract trucks to the site as directed, where it was used in performance of the contract. The sellers delivered to the contractors the invoice of the lumber, stating that it was "sold to the United States Construction Quartermaster %" [for account of] the contractors.[2] The invoice was then approved by the Construction Quartermaster for payment; the contractors paid King and Boozer by their check the amount of the invoice and were later reimbursed by the Government for the cost of the lumber.

We think, as the Supreme Court of Alabama held, that the legal effect of the transaction which we have detailed was to obligate the contractors to pay for the lumber. The lumber was sold and delivered on the order of the contractors which stipulated that the Government should not be bound to pay for it. It was in fact paid for by the contractors who were reimbursed by the Government pursuant to their contract with it. The contractors were thus purchasers of the lumber within the meaning of the taxing statute, and as such were subject to the tax. They were not relieved of the liability to pay the tax either because the contractors

[2] The statement that the lumber was "sold" to the Construction Quartermaster appears to have been inadvertent. On the argument the Government conceded that this was not the usual practice. The invoices appearing of record in No. 603, Curry *v.* United States, issued to the same contractors for supplies ordered by them and delivered at the same site stated that the supplies were sold to the contractors.

in a loose and general sense were acting for the Government in purchasing the lumber or, as the Alabama Supreme Court seems to have thought, because the economic burden of the tax imposed upon the purchaser would be shifted to the Government by reason of its contract to reimburse the contractors.

The Government, to support its thesis that it was the purchaser, insists that title to the lumber passed to the Government on shipment by the seller, and points to the very extensive control by the Government over all purchases made by the contractors. It emphasizes the fact that the contract reserves to Government officers the decision of whether to buy and what to buy; that purchases of materials of $500 or over could be made by the contractors only when approved in advance by the contracting officer; that the Government reserved the right to approve the price, to furnish the materials itself, if it so elected; and that in the case of the lumber presently involved, the Government inspected and approved the lumber before shipment. From these circumstances it concludes that the Government was the purchaser. The necessary corollary of its position is that the Government, if a purchaser within the taxing statute, became obligated to pay the purchase price.

But however extensively the Government may have reserved the right to restrict or control the action of the contractors in other respects, neither the reservation nor the exercise of that power gave to the contractors the status of agents of the Government to enter into contracts or to pledge its credit. See *United States* v. *Algoma Lumber Co.*, 305 U. S. 415, 421; *United States* v. *Driscoll*, 96 U. S. 421. It can hardly be said that the contractors were not free to obligate themselves for the purchase of material ordered. The contract contemplated that they should do so and that the Government should reimburse them for their expenditures. It is equally plain that they did not assume to bind the Government to pay for the lumber by their order, approved by the Contracting Officer, which stipulated that it did not bind or purport to bind the Government. The circumstance that the title to the lumber passed to the Government on delivery does not obligate it to the contractor's vendor under a cost-plus contract more than under a lump sum contract. Cf. *James* v. *Dravo Contracting Co., supra; United States* v. *Driscoll, supra.*

We cannot say that the contractors were not, or that the Government was, bound to pay the purchase price, or that the con-

tractors were not the purchasers on whom the statute lays the tax. The added circumstance that they were bound by their contract to furnish the purchased material to the Government and entitled to be reimbursed by it for the cost, including the tax, no more results in an infringement of the Government immunity than did the tax laid upon the contractor's gross receipts from the Government in *James* v. *Dravo Contracting Co., supra.* See *Metcalf & Eddy* v. *Mitchell, supra,* 523, 524; *Trinityfarm Co.* v. *Grosjean, supra,* 472; *Helvering* v. *Gerhardt, supra,* 416; *Graves* v. *New York ex rel. O'Keefe, supra,* 483.

Reversed.

Mr. Justice JACKSON took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.

P. 1

SUPREME COURT OF THE UNITED STATES.

No. 603.—October Term, 1941.

John C. Curry, Individually and as Commissioner of Revenue of the State of Alabama, Petitioner,
vs.
The United States of America, Dunn Construction Company, Inc., and John S. Hodgson and Company, Partners Doing Business as Dunn Construction Company, Inc., and John S. Hodgson and Company.

On Writ of Certiorari to the Supreme Court of the State of Alabama.

[November 10, 1941.]

Mr. Chief Justice Stone delivered the opinion of the Court.

This is a companion case to No. 602, *State of Alabama* v. *King and Boozer and the United States,* decided this day. It presents the question whether the contractors, by the cost-plus contract involved in the *King and Boozer* case, who are respondents here, are immune from the use tax imposed by the Alabama statute, Act No. 67, General Acts of Alabama, 1939, because the materials with respect to the use of which the tax was laid, were ordered by the contractors and used by them in the performance of their contract with the Government.

Section II of the taxing act provides: "(a) An excise tax is hereby imposed on the storage, use or other consumption in this state of tangible personal property purchased at retail . . . for storage, use or other consumption in this state at the rate of two per cent (2%) of the sales price of such property, . . . (b) . . . Every person storing, using or otherwise consuming in this State, tangible personal property purchased at retail shall be liable for the tax imposed by this act . . ." Section III exempts from the operation of the statute the storage, use or other consumption of property, the sale of which is taxed by other provisions of the statutes, and the storage, use

or consumption of property, taxation of which is prohibited by the Constitution or laws of the United States.

Petitioner, Commissioner of Revenue for the State, assessed and collected from the contractors a tax on their use or consumption, within the state, of a quantity of roofing which they purchased outside the state and caused to be shipped to the camp site within the state, where they used it in the performance of their construction contract with the Government. The present suit was brought by the United States and the contractors in the state circuit court against petitioner, individually and as Commissioner, for a declaratory judgment determining the tax liability of the contractors and for a decree ordering refund of the tax paid by the contractors. The lawfulness of the tax was challenged specifically on the ground that the plaintiffs, respondents here, are exempt from the tax by the provisions of the state statute and are immune from it, because the use and consumption of the roofing by the contractors as agents or instrumentalities of the United States is constitutionally immune from taxation.

The circuit court sustained the tax, declaring that it was laid upon the contractors by the statute and that they were not constitutionally immune from the tax because of their use of the purchased property in performance of their contract with the United States. The Supreme Court of Alabama reversed, 3 So. (2d) 582, holding that the tax infringed the constitutional immunity of the United States, for reasons stated in its opinion in *King and Boozer* v. *State of Alabama*, 3 So. (2d) 572. We granted certiorari, 314 U. S. —, so that we might consider this with the *King and Boozer* case.

Since the Supreme Court of Alabama rested its decision on the constitutional ground and not upon the inapplicability of the taxing statute to the contractors, we assume for present purposes, as we take it the state court assumed, that the contractors are subject to the tax but for the asserted Government immunity, and that upon the correct interpretation of the Alabama statute they would have been subject to the tax if their cost-plus contract had been with a private individual. Cf. *Felt & Tarrant Co.* v. *Gallagher*, 306 U. S. 62; *Southern Pacific Co.* v. *Gallagher*, 306 U. S. 167; *Department of Treasury* v. *Wood Corp.*, 313 U. S. 62.

For the reasons stated at length in our opinion in the *King and Boozer* case we think that the contractors, in purchasing and

bringing the building material into the state and in appropriating it to their contract with the Government, were not agents or instrumentalities of the Government; and they are not relieved of the tax, to which they would otherwise be subject, by reason of the fact that they are Government contractors. If the state law lays the tax upon them rather than the individual with whom they enter into a cost-plus contract like the present one, then it affects the Government, like the individual, only as the economic burden is shifted to it through operation of the contract. As pointed out in the opinion in the *King and Boozer* case, by concession of the Government and on authority, the Constitution, without implementation by Congressional legislation, does not prohibit a tax upon Government contractors because its burden is passed on economically by the terms of the contract or otherwise as a part of the construction cost to the Government.

Upon the record as it comes to us we are not called upon to determine whether the taxing statute is applicable to transactions of the contractors on the camp site, a government reservation. We decide only the question passed upon by the Supreme Court of Alabama, that if the statute is applicable to and taxes the contractors upon a cost-plus contract like the present, if entered into with a private person, they are not immune from the tax when, as here, the contract is with the Government.

Reversed.

Mr. Justice JACKSON took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.

ing day must be duly approved and properly recorded. No arrears shall be allowed to accumulate.

47. He shall see that his department is economically administered having regard for the urgency of the work and that due care is exercised in the handling of Government property entrusted to him.

48. All accountability papers must be signed by the Constructing Quartermaster or the property officer if other than the Constructing Quartermaster is so designated or a commissioned assistant designated by him.

49. The Field Auditor must instruct all members of his staff that their work is entirely confidential and no information is to be disclosed by any one to anybody except through official channels.

Field Auditor's Staff:

50. The basis for the organization of the Field Auditor's office shall be seven (7) general departments as follows:

Department	Head	Principal Duties
1. Fiscal	Chief Fiscal Auditor	Money Accountability
2. Materials	Chief Material Inspector	Receiving, Inspection and Delivery of Materials.
3. Labor	Chief Time Inspector	Supervising Time and Payrolls
4. Transportation	Chief Transportation Inspector	Handling Traffic and Claims
5. Tools and Equipment	Chief Equipment and Tool Inspector	Contract Property and Rentals.
6. Commissary	Chief Commissary Auditor	Supervising Commissary
7. Administrative	Administrative Assistant	Mail, Filing, Personnel General

51. Attached to this manual is an organization chart showing the departmental relations in the Constructing Quartermaster's Office in a general way. Two or more departments shall be combined under one head whenever conditions warrant it.

[fol. 99] 52. The Field Auditor shall furnish the Engineering Department of the Constructing Quartermaster with such cost data from financial records as shall be required. The cost analysis shall not, however, be in his charge but shall be prepared by the Cost Accounting Section of the Engineering Department.

53. Each and every employee of the Field Auditor's staff is obliged to carry out the instructions of the Field Auditor

to the fullest extent in whatever department his services may be required.

54. The heads of the Departments shall be furnished, by the Field Auditor, with copies of this guide, general instructions to Constructing Quartermasters and, where necessary, all contracts and sub-contracts.

Fiscal Department:

55. The Fiscal Department shall be in charge of the Chief Fiscal Auditor, who shall act in general supervision, under the Field Auditor, of all of the departments. In the absence of the Field Auditor, the Chief Fiscal Auditor will act for him in directing the operations of his staff. His principal duties include the following:

1. Final audit of all invoices, payrolls, etc.
2. Maintaining controlling account for Invoice Register.
3. Recording vouchers.
4. Maintaining record showing status of funds.
5. Maintaining liability record.
6. Preparation of financial reports.

56. The Chief Fiscal Auditor receives checked invoices from the Materials, Commissary and Tool Departments with the supporting papers and checked payrolls from the Labor Department with receipts attached.

57. He makes a detailed audit of all papers and checks the distribution. A file showing the approved signatures of all persons authorized to pass on vouchers, shall be kept for reference.

58. After having audited the papers, the Chief Fiscal Auditor will place his signature on the original and duplicate copies of the invoices and payrolls.

Materials Department:

59. The Materials Department is administered under the supervision of the Chief Materials Inspector.

60. The principal duties of this department may be [fol. 100] grouped under five sub-divisions, as follows:

Branch	Head	Principal Duties
(a) Purchase Order	Order Clerk	Checking prices and recording of orders.
(b) Receiving and stores	Chief Receiving Clerk	Checking quantities received and supervising stores.
(c) Inspection	Chief Inspector	Inspecting quality
(d) Invoice	Invoice Clerk	Recording and checking invoices and maintaining statistical record of expendable materials.
(e) Property	Property Record Clerk	Maintaining property records.

Labor Department:

61. It is the policy of the Construction Division that the contractor shall keep all time and prepare all payrolls, the Field Auditor maintaining an independent check of the time and auditing the payrolls. The time keeping system must be adapted to the particular requirements of the project.

62. The Labor Department shall have entire supervision of all labor accounting including the checking of time and payment of wages.

63. This department shall be in charge of the Chief Time Inspector whose principal duties are as follows:

a. To maintain a record of employees.

b. To make an independent check of the time of employees.

c. To audit payrolls.

d. To verify wages paid employees and to witness payment thereof.

e. To check *t*eceipts for wages with payrolls in order to determine the amount to which the contractor is entitled for reimbursement.

f. To maintain continuous record of unclaimed wages.

g. To supervise team accounting in the same manner as labor accounting.

Traffic Department:

64. The Traffic Department is administered under the supervision of the Chief Transportation Inspector. The duties of the Traffic Department include the following:

a. Maintaining Traffic Records of all shipments received.

b. Preparing bills of lading for accomplishment by proper officer and maintaining record thereof.

c. Keeping in touch with downtown freight yards and depots, appointing special representative if necessary and notifying Materials Department in advance of arrival of freight.

d. Maintaining record of all demurrage and the reason for the accruing of the charge.

[fol. 101] e. Preparing claims against carriers.

Equipment and Tools Department:

65. The Equipment and Tools Department, dealing with the purchase and rental of all tools and equipment, shall be in charge of the Chief Equipment and Tools Inspector.

66. The duties of the Chief Equipment and Tools Inspector with respect to purchase of tools and equipment shall include the following:

a. To inspect all tools and equipment when brought on the work, and to see that they are in sound and workable condition.

b. To secure memorandum receipts for all non-expendable material for which the contractor is reimbursed.

c. To keep a close watch on the contractor's tool house and supervise methods of handling tools in order that wastage and loss may be reduced to a minimum.

67. The memorandum receipts for tools and equipment used by the contractor, whether signed by him or not, shall be held as a charge against the contractor until the completion of the work pending final settlement.

68. The contractor must properly safeguard the handling of tools. Where possible all tools should be passed through a general tool house and receipts taken from the men or sub-foreman as they are issued. It will be necessary for the contractor to maintain a file showing signatures of his foreman and sub-foreman for reference.

Commissary Department:

69. The Commissary Department is administered under the supervision of the Chief Commissary Auditor.

70. The standard form of contract provides that the cost of all commissary operating personnel and supplies will be borne by the Contractor and that all commissaries shall be operated as nearly as possible without profit or loss and shall be subject to such sanitary regulations as the Constructing Quartermaster may prescribe.

71. It will be the duty of the Chief Commissary Auditor to audit commissary expenses and receipts for the purpose of determining that the provisions of the contract are properly carried out by the Contractor.

Administrative Department:

72. The Administrative Department shall be in charge [fol. 102] of the Administrative Assistant.

73. His particular duties shall include direct charge of the following:

a. Personnel.

b. Mail, telegrams, etc.

c. Files.

d. Supplies.

e. General.

74. The Administrative Assistant shall see that all documents and reports from the various departments, and also from the contractor, are properly and promptly forwarded to the Field Auditor.

75. He shall keep a daily record of time of all employees on the Field Auditor's staff and shall have charge of the payroll. He must familiarize himself with the Government regulations in respect to civilian employees and see that all records are kept and payments made in accordance with existing instructions and regulations.

76. If so directed by the C. Q. M. the Administrative Department of the Field Auditors office may act as the Administrative Dept. for the entire office of C. Q. M.

77. Copy of Instructions to Contractors relating to accounting and auditing procedure under Cost-Plus-A-Fixed Fee Contracts immediately follows:

"Instructions to Contractors Relating to Accounting and Auditing Procedures Under Cost-Plus-A-Fixed-Fee Contracts."

General

1. The Constructing Quartermaster (C. Q. M.) in charge of the project controls the accounting methods and procedures under fixed-fee contracts through an auditing staff, headed by a Field Auditor, organized, generally, as follows:

Field Auditor

Department	In Charge of
Fiscal	Chief Fiscal Auditor
Materials	Chief Materials Inspector
Labor	Chief Time Inspector
Transportation	Chief Transportation Inspector
Tools and Equipment	Chief Tools and Equipment Inspector
[fol. 103] Commissary	Chief Commissary Auditor
Administration	Principal Clerk

2. The contractor will carefully observe the provisions of the contract respecting accountability and the related laws and Governmental regulations. Full cooperation will insure prompt reimbursement for expenditures. The Field Auditor makes a detailed pre-audit of all costs and expenses incurrex—prior to payment thereof by the contractor insofar as this is practicable. Upon receipt of the contractor's vouchers for reimbursement, verification will be readily possible by the Field Auditor. Thereupon the verified voucher will promptly be submitted to the C. Q. M. for his approval and certification to the Finance Officer for payment.

3. Essential general requirements that must be observed by the contractor are: (a) Make no commitment without subjection to the approval of the C. Q. M. (in advance if so required); (b) Support all vouchers for reimbursement with original invoices or original payrolls accompanied by original receipts from vendors or employees.

4. The Contractor's office procedure and accounting system will presumably be found adaptable to Government requirements. The Field Auditor will see to it that the practices are in line therewith.

Detailed Instructions

1. Purchases of Materials, Equipment, Etc.

a. 3 bids required (where sources are available).

b. Purchase orders are subject to approval of the C. Q. M. See attached specimen form for instructions, copies required, etc.

c. Receipts of materials, etc. are to be checked and inspected by the C. Q. M. upon delivery.

d. Vendors' invoices—original (receipted) and three copies are required by C. Q. M.

e. Vendors' receipts are required on original invoices. In case of more than one invoice from a vendor, summary statement may be receipted.

2. Employees—Wage Rates, Time and Payroll

a. Wage rates are fixed by schedule determined by Labor Department.

b. Salaried employees' compensation shall be on basis of preceding year unless increase is approved by the C. Q. M.

c. All employees are to be hired subject to approval of [fol. 104] the C. Q. M. Personal history of each employee is to be on record.

d. Employees are to be checked in and out each day by the C. Q. M. and each morning and afternoon on the job.

e. Payroll deductions are limited to Social Security taxes and State taxes.

f. Payroll. Original (supporting reimbursement voucher) and three copies are required by C. Q. M.

g. Payment of wages must be witnesses by representative of C. Q. M.

h. Receipt for wages is required from each employee.

3. Rental of Equipment

a. Rental rates will be predetermined by the C. Q. M.

b. Rental contracts shall be subject to approval by the C. Q. M.

c. Valuation of rented equipment shall be subject to approval of the C. Q. M.

d. Title to rented equipment shall vest in the Government when total rental paid equals valuation (an additional 1% per month to be paid by the Government).

e. Rental equipment shall be in sound and workable condition.

f. Time of rental shall be verified currently by the C. Q. M.

g. Payment of rental shall be made monthly.

h. Receipts for rental shall be obtained from owner of equipment.

4. Transportation Charges On Materials and Equipment.

a. All transportation charges shall be verified and approved by the C. Q. M.

b. Original receipted freight or trucking bills shall accompany reimbursement voucher.

5. Traveling Expenses

a. All traveling expenses are subject to the approval of the C. Q. M.

b. Advance written approval of the C. Q. M. is required in particular respect to (1) transportation and traveling expenses to and from the work of the field forces, and (2) traveling and hotel expenses of officers, engineers and other employees of the contractor.

c. Travel expenses and subsistence shall conform to the allowances authorized by the "Standardized Government Travel Regulations", unless otherwise authorized by the C. Q. M.

d. Receipts from recipients of travel expense shall be required in each case.

[fol. 105] 6. Cash Discounts, etc.—The Contractor shall take advantage of all discounts and allowances.

7. Fixed Fee—Ninety per cent (90%) of the fixed fee shall be paid as it accrues in monthly installments based upon the percentage of completion of the work. The unpaid balance shall be paid upon final acceptance of the work.

8. Records—All records shall be preserved by the contractor for three years after completion of the work.

9. Bonds—The contractor shall furnish such bonds as may be required.

10. Contractor's Organization—The contractor shall furnish the organization charts and statements of procedure called for by the C. Q. M.

Office of the Quartermaster General
Chart of the Office of the Construction Division

Chief of
Construction Division

Liaison Branch	Executive Office	Funds & Estimates Branch
Administration Branch	Construction Branch (Lump-Sum Contracts)	Accounting & Auditing Branch
Engineering Branch	(W.P.A. & P. and H. Work)	Repairs & Utilities Branch
Construction Branch (Fixed-Fee Contracts)	Legal Branch	
	Procurement & Expediting Branch	Real Estate Branch

[fol. 106] Organization Chart

Office of the Constructing Quartermaster
For Work Under Fixed Fee Contracts Only

S C Q M
C Q M
Comm. Off.

Field Aud. See Cht. "A" (Civilian)	Property Off. Comm. Off	Executive Officer Comm. Off.	Ton. Officer (See Cht A) Comm. Off.	Safety Engr. Fire Marshal & Sanit. Off. Comm. Off.	Chief Clerk (Civilian)
Supervision of Engineering by Government Check on Arch. and Engr. Plans and Serve in an Advisory Capacity as Directed by the C. Q. M. Necessary Commissioned Off's. & Civilian Engrs as needed.	Architectural of Engineering Contractor For The Architectural and Engineering Design of Project including Supervision & Inspection During Constn. Force as decided With The CQM	Construction Contractor For The Construction of the Project Furnishes all Labor, Material and Equipment as provided in Contract Force as decided With the CQM	Supervision of Construction by Government Check on Const. Operations Necessary Comm. Officers and Civilian Assistants		Personnel Mail and Records Reports Statistics Files Stenogs. & Messengers

NOTE: This chart is functional only and may be changed to suit local conditions. It must be understood that on a Fixed Fee Project the Fixed Fee Architectural or Engineering Contractors will do all the Architectural, Engineering and Inspection work and this Word should not be duplicated by the C. Q. M. Maximum use will be made of Officers in a Supervising Capacity. The American Railroad Association, Public Roads Administration under Federal Works Agency, and the National Board of Fire Underwriters may be requested to furnish representatives if needed.

[fol. 107]

Chart of Field Auditor's Organization
Constructing Quartermaster
Field Auditor

Fiscal
Chf Fis Aud

Materials Chf. Mat'ls. Inspector	Labor Chief Time Inspector	Traffic Chief Transp Inspector	Funds	Tools & Eqpt Chief Eqpt & Tools Insp	Commissary Chf Com'ary Auditor	Administr've Administr've Assistant
Orders Order Clk	Employee's Records Record Clk	Traffic	Liability Records	Contract Property		Personnel
Invoices Invoice Clk	Time Time Chkrs	Claims	Status of Funds	Rentals		Mail
Recording	Pay Roll Pay Roll Clk		Vouching			Filing
Receiving Rec'vg Clk	Payment of Wages Payment Clk		Auditing			Supplies
Receiving Storing Issuing Inspecting Inspector			Record'g Costs Reports Statistics			General
Property Records		Equipment & Supplies	Labor	Revenue	Operating Results	

Mess Houses and Stores

Prices	Invoices	Warehousing	Time	Payroll	Cash	Payroll Deductions	Receipts & Expenditures	Profit or Loss

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[fol. 108] EXHIBIT "B"

War Department, Office of the Quartermaster General, Washington

In Reply Refer to QM 300.5. (Fixed Fee Letter No. 5).

Subject: Relations Between Constructing Quartermaster and Contractor on Cost-Plus-A-Fixed-Fee Contracts.

To: The Constructing Quartermaster:

1. Considerable difficulty has arisen in the field due to the lack of understanding on the part of the Constructing Quartermaster in regard to his relations with the contractor who has been selected by this office to perform the work. Constructing Quartermasters should bear in mind at all times that construction being carried out under cost-plus-a-fixed-fee contract is in the nature of a co-adventure between the contractor and the Government. The Constructing Quartermaster's principal function comprises general su-

pervision of the contractor's operations and to see that Government interests are protected, and not to furnish technical supervision and directions for the contractor's work. Both the engineering and construction contractors have been paid a fair fee for doing their respective parts of the work and they should be given a free hand in doing these operations, insofar as they are consistent with good practice, and an accurate accounting is kept of all expenditures.

2. Your particular attention is invited to letter of this office, 300.5 Fixed Fee Letter No. 1—Subject: Directive and Instructions on Cost-Plus-A-Fixed-Fee Contracts, C. B. F. F. General Field Letter No. 1, paragraph 3, it is felt that this gives you a clear definition of what is expected of you. In cases of borderline decisions between what you think is correct and the contractor's judgment based on his past experience of what he feels is the proper procedure, there should be a tendency to go the contractor's way so long as fundamental laws are not violated and the Government's interests are protected. In certain remote localities the actual securing of a number of bids on small purchases of one thousand dollars or less is frequently a hardship and costs more in telephone tolls and administrative expense than the savings involved and more seriously the securing of such a number of bids requires waste of valuable time. For such small purchases the contractor should be permitted to make the purchase in his customary manner at what you and his purchasing agent consider to be a fair market price. On many occasions it will only be possible to get one quotation and if such quotation is satisfactory on [fol. 109] its face and appeared to be a just price, you should not hesitate in permitting the contractor to make these purchases in order that the progress of the work will not be delayed.

3. The only restriction that has been placed upon the salary of contractors' employees is that no employee receiving in excess of $9,000 per year will have his salary reimbursed by the Government. Salaries below that figure are subject to your approval and need not be submitted to this office for final approval. In this we rely on you to use your best judgment in determining whether or not the man employed has a record in the past that will justify the

salary to be given. It should be borne in mind that to complete these projects in the time required, a high calibre type of personnel must be employed by the contractor and in order to secure that type of personnel the contractor must of necessity pay a substantial salary at all times somewhat in excess of what the person has been accustomed to receiving, due to the employee having to leave his home and set up a new residence or maintain a double establishment for a very short period of time, and furthermore, it should be recognized that certain men during the past few years have worked at salaries below their normal capacity due to the scarcity of jobs which they are qualified to fill.

4. It has been noted that in some cases the Constructing Quartermasters have been requiring their contractors to take out certain forms of fire insurance. Subject to your approval this insurance is a matter for the contractor to decide on, so long as the property is in his possession and has not yet become the property of the Government but as soon as such property arrives at the site and is checked in by your inspecting staff and actually becomes the property of the Government, there is no need for fire insurance inasmuch as the Government has always been a self-insurer and, due to the volume of material handled by the Government, it has not been found economical to insure its own property. Extreme care, however, must be taken to guard against loss by fire and mechanical fire extinguishers, fire barrels, etc., must be liberally distributed over the job and alert watchmen maintained at all times to guard against fire. This office will recognize requisitions for fire fighting equipment to be sent to projects whenever the Constructing Quartermaster feels that it is required in connection with his work.

5. It being wholly impossible to foresee and enumerate in the contracts all of the items of materials, services, and labor (which terms are all inclusive) to be furnished or provided [fol. 110] by the contractors, the contracts enumerate only the major items specifically required by the contracts and certain other items which could be foreseen as likely to enter into the operations under the contracts. The contracts, therefore, provide that the term "actual net cost" shall include specifically but not exclusively the items enumerated. Inevitably many unforeseen items of cost arise during the

progress of the work of the character and magnitude of that covered by these contracts.

6. The present authorization for the use of cost-plus-a-fixed-fee contracts was justified by the very unusual construction program involved in the development of outlying posts where there are no ready contacts with labor and material markets, where the working conditions are hazardous, and the time element was of serious moment. The speedy and certain accomplishments of the projects covered by the contracts was and is considered by those bearing the burden of responsibility for the national defense as of the utmost importance. The contractors selected to cooperate with the Government and contribute their resources, experience, and skill toward the accomplishment of the projects, include in their organizations men of unquestionable integrity and patriotism. Their success in the commercial world establishes their abilities. Their judgment along the lines of their qualifications is entitled to the highest of faith and credit. The monetary compensation they will receive is comparatively modest as indicated by the fees allowed. The general intent of the special legislation, the negotiations thereunder, and the contracts is clearly that the contractors shall be made whole for their out-of-pocket expenditures for the benefit of the work under the contracts, as may be approved or ratified by the contracting officer, acting under the direction of the Secretary of War. Any action which conforms to such general intent is entitled to approval.

For the Quartermaster General.
E. E. Kirkpatrick, Captain, Q. M. C., Assistant.

40/1600.

[fol. 111] [Stamp:] Received Feb. 24, 1941. C. Q. M., Fort McClellan, Alabama

EXHIBIT "C"

War Department

Office of the Quartermaster General
Washington

In Reply Refer to QM 300.5 C-C.

February 19, 1941.

Construction Division Letter No. 101

Subject: Responsibility of Local Constructing Quartermasters and Relationship with Architect-Engineers and Construction Contractors on Projects

To All Zone Constructing Quartermasters, All Local Constructing Quartermasters, All Architect-Engineers (through local C. Q. M.), All Construction Contractors (through C. Q. M.):

1. The local Constructing Quartermaster is the official in responsible charge of the project to which he is assigned. He is the authorized representative of the Government on the project. He will discharge his duties under the direction and supervision of the Quartermaster General through the orders and instructions of the Chief of the Construction Division and the Zone Constructing Quartermaster of the Zone in which his project is located. In the absence of the local Constructing Quartermaster the next senior assistant Constructing Quartermaster will function in his stead unless otherwise arranged by the Zone Constructing Quartermaster.

2. The Architect-Engineers and the Construction Contractors on the project together with the military and civilian assistants assigned for duty with the local Constructing Quartermaster will report to and are responsible to the local Constructing Quartermaster as the authorized representatives of the Government in charge of the project. However, nothing is contemplated in the operations of the project which relieves the Architect-Engineer and the Contractor of their responsibility to the Government for

sound and economical fulfillment of their contractual and professional obligations.

3. The Local Constructing Quartermaster will:

a. Insure compliance with terms of contracts.

b. Assure correctness of expenditures.

[fol. 112] c. Serve as a liasison officer for the Architect-Engineer and for the Construction Contractor in all phases of government operations.

d. Obtain full information as to Government Requirements so as to facilitate the work of the Architect-Engineer and the Construction Contractor.

e. Negotiate contractual arrangements involving sewage disposal with municipalities, right-of-way with adjoining property owners, railroad spurs and the like, subject to the advice and such approval as is necessary by the office of the Quartermaster General. In this the local Constructing Quartermaster may use the services of the Architect-Engineer or the Contractor.

f. Approve or secure approval of sub-contracts submitted by the Construction Contractor or the Architect-Engineer.

g. Promptly transmit instructions and information to the Architect-Engineer and the Construction Contractor received from the office of the Quartermaster General in Washington.

h. Act or secure action promptly on all requests or recommendations of the Architect-Engineer or of the Construction Contractor.

i. Exercise overall supervision of the project to insure that all phases of it are being soundly coordinated.

4. The Architect-Engineer, under the direction of the Local Constructing Quartermaster, will:

a. Insure that the project requirements are met in accordance with sound design and construction practice, including the overall project layout, as well as the design and arrangement of specific structures and utilities. Standard Army structures will be employed unless the Architect-Engineer's review of the plans indicates a practice that he deems unsuitable, in which case he will make suitable recom-

mendations, with reasons therefor, to the local Constructing Quartermaster.

b. Insure that construction conforms with design, and make or require to be made such tests and inspections as may be necessary to determine quality and conformity with plans and specifications.

c. Prepare a sound estimate of overall cost and the [fol. 113] costs of the major parts of the project, including such breakdown as may be required by the local Constructing Quartermaster.

d. Prepare, in conjunction with the Construction Contractor, job progress schedules.

e. Report on and make recommendations as to the relationship of actual progress and scheduled progress, and actual costs and estimated costs.

f. Perform such other duties as directed by the local Constructing Quartermaster.

5. The Construction Contractor, under the direction of the local Constructing Quartermaster, will:

a. Conduct, in an efficient manner, all phases of the construction work. Important in this is a prompt and comprehensive organization set-up to insure effective job planning, forward-looking handling in the employment of labor, including wages, conditions of work, safety, food, housing and transportation; procurement of materials and methods to facilitate storage, distribution and fabrication in the field at the location desired; procurement of good construction equipment. In the procurement of materials there is involved the responsibility to take such steps as are necessary to insure delivery of materials where the initial procurement steps have been taken by Government agencies; lumber, heaters, and boilers for hospital units are examples.

b. Advise the Architect-Engineer in the preparation of a sound estimate of overall cost, and a breakdown of the cost of the larger parts of the project; concur in such estimates or make notation of exceptions; advise Architect-Engineer when any revision of estimates becomes necessary; install adequate cost control procedures.

c. Prepare, in conjunction with the Architect-Engineer, job progress schedules; advise Architect-Engineer when

any changes become necessary; install adequate progress control procedures.

d. Maintain such cost data as is required by the Government.

6. On projects, such as Ordnance Manufacturing Plants, a Design-Consultant may be employed to insure that the plant is of sound design and such as to best meet the operating conditions imposed by the Using Service for which the plant is being constructed. Close cooperation between the Using Service, the Design-Consultant, the Architect-Engi- [fol. 114] neer, the Construction Contractor, and the local Constructing Quartermaster is therefore of paramount importance in order to insure the construction of a plant with satisfactory operating characteristics.

The Using Service is the service for which the plant is being constructed and is the service which will be responsible for the operation of the plant. Its position is analagous to that of a client in private construction practice. The local Commanding Officer of such plant is the representative of the Using Service on the ground and is responsible that the needs of that Service are fully considered at all times.

The needs of the Using Service will be communicated to and carried out on the project through the local Constructing Quartermaster, unless they contravene standing orders, existing policy, are extravagant or contrary to sound engineering practice. In such cases the matter will be referred at once to the Zone Constructing Quartermaster.

7. On projects at troop stations, as distinct from manufacturing plants, the Local Constructing Quartermaster is not authorized to undertake any program changes desired by local authorities unless and until such changes are concurred in by the Zone Constructing Quartermaster and approved by this office.

8. All previous instructions at variance with the provisions of this letter are hereby rescinded.

For The Quartermaster General:
Brehon Somervell, Brigadier General, U. S. A., Assistant.

Distribution List:

12 Copies to Each Zone Constructing Quartermaster.
5 Copies to Each Constructing Quartermaster.

Copies to all Branches, Control Section and Public Relations Section, Construction Division, War Department and Bureaus Concerned.

[fol. 115] EXHIBIT "D"

Conference Held with Dunn Construction Company and John S. Hodgson and Company

Conference held in Room 2241, Munitions Building, Washington D. C. September 6, 1940, with Mr. W. R. J. Dunn of the Dunn Construction Company, Inc., and Mr. John S. Hodgson of the John S. Hodgson & Company of Birmingham, Alabama, representing the Contractor: and Lt. Colonel E. G. Thomas, Mr. H. W. Loving and Mr. F. J. O'Brien, representing the Government relative to construction of Camp McClellan, Alabama, with Mr. Loving presiding.

Mr. Loving: Mr. Dunn, as I advised you this afternoon, you and Mr. Hodgson have been recommended by the Construction Advisory Branch for consideration in connection with the construction of the permanent tent camp to be built at Camp McClellan, Alabama. I showed you a description and estimate of cost of the work to be done which consists of utilities estimated to cost approximately $796,700 and temporary buildings of various kinds estimated to cost $2,674,250, which with certain tents for troops which are displaced by the hospital, will make a total project cost including overhead, engineering and contingencies of approximately $3,702,935. Based on the best information available at this time we estimate that the net construction cost plus the contemplated fee to be paid the contractor totals $3,335,977. As I advised you further, time is vitally important in this particular instance as it is desired if humanly and physically possible, to complete this project by October 15th. Practically all of the plans are complete. However, it will be necessary for the Government to retain private engineers to make certain surveys locally, to develop a topographic map to design the utilities, to place these standard buildings to be constructed on the definite site. It is contemplated that this engineer be employed immediately and that the necessary engineering work to be done without delay. Further, that construction parallel the engineering work and completion of plans as closely as

possible. From your questionnaire I note that the combined annual volume of work done by the Dunn Construction Company and John S. Hodgson & Company, has averaged about $3,000,000 in recent years. I would like to ask what volume of work both of you have under construction at this time, or under contract?

Mr. Dunn: The two companies have today between $100,000 and $125,000 of uncompleted work on hand.

[fol. 116] Mr. Loving: You, therefore, then based on your statement of average volume, are in a position insofar as finances, personnel and equipment are concerned to undertake approximately $3,000,000 work at this time. Is that correct?

Mr. Dunn: At least that much or more.

Mr. Loving: Do you contemplate, if awarded contract for construction of the work at Camp McClellan, to continue active in the competitive market?

Mr. Dunn: Except for exceptional isolated cases, in dealing with old customers, where the volume is small, we do not expect to continue in the competitive field.

Mr. Loving: Considering the time element, it is anticipated that it will be necessary for the members of both organizations to devote practically their entire time toward planning, organizing, purchasing and directing the construction of this project in order to complete the project within the desired time. If awarded the contract may we count on the cooperation and direction of you two gentlemen as principals, and your other key men except in the instances to which you refer?

Mr. Dunn: Yes, Sir.

Mr. Loving: For your information, Mr. Dunn, there is a feeling in certain quarters that there are few men in the South, possessing the necessary experience, organization, energy, vision and initiative required to handle a project of this character. Personally I do not share this belief and do not consider the fact that a successful contractor has not actually executed contracts of like volume as definitely proving that he cannot if he devotes his time, attention and organizing ability to it, organize to handle a job of this magnitude. If you are retained to handle this job I feel to a large extent that the honor and pride of the State of Alabama will be largely at stake. The Government has selected Fort McClellan as a site for an important camp and I feel

that you as principals of these two contracting firms and others who have pride in accomplishment of the citizens of Alabama, could do nothing better than to put their shoulders to the wheel, cooperate to the fullest extent, to show the War Department and critics from other sections that you, as contractors, the suppliers of labor, materials and equipment in Alabama, can accomplish results as efficiently and as economically as anyone else from any other part of the country. Mr. Dunn, as a result of work that you did under the direction of my old engineering firm and my personal knowledge of your business capacity and general standing in your community. I am assuming the responsibility of [fol. 117] offering to you and Mr. Hodgson the job of undertaking the construction of this project at Camp McClellan, believing that you will take a personal pride in this project, and having faith that I will never have cause to regret having recommended you, a Southern contractor, to undertake this project. In order to expedite the delivery of lumber, heaters, pipe and other standard articles of materials required for the project we are now having made a complete material take-off and as soon as this information is available, it is contemplated that the Government, through Procurement Branch, will enter the market and attempt to locate and secure firm quotations for these materials. It is contemplated that if satisfactory prices can be secured, definite orders for all of the lumber will be placed and instructions for shipment and delivery will be made without delay. As I informed you, it is estimated that approximately $3,778,000 will be required for the construction of the project and the payment of engineering, overhead and supervision expenses. At present there is actually available $400,000 leaving a deficit as of today of approximately $3,378,885 which deficit it is anticipated the Congress will cover by making additional appropriations available for this work. It is contemplated that a contract be prepared and executed to cover the entire work planned but it will be necessary to include in the agreement, a provision to the effect that if additional funds are not made available by the Congress that expenditures incurred by you shall not exceed $400,000. This means that it will be necessary for us to review and check the plans for the project and to select certain utilities and certain structures to be constructed which can be built within the funds now available. It is my understanding that you consider you are equipped and prepared to handle the

construction of all items of work with your own forces except inside electrical work, plumbing and heating, and possibly the outside electric distribution system. Is that correct?

Mr. Dunn: Yes Sir. From what we have seen, from what we know about the project now, we think that is the case.

Mr. Loving: I may state that the project embraces certain relatively simple building projects and certain simple utilities, such as water and sewer plants, roads, railroads, telephone and electric distribution systems.

Mr. Dunn: The only parts of the work that we contemplate subletting are such parts as time and money would be saved by subcontracts.

[fol. 118] Mr. Loving: We recognize, Mr. Dunn, that but few, if any, general contractors are fully equipped and manned to undertake every phase of building construction. We recognize that it is customary for the average general contractor to sub-let inside electrical plumbing and heating and similar mechanical work. According to the best estimate we are able to prepare at this time to estimate the net construction cost exclusive of overhead, engineering and fixed fee to be paid the general contractor at $3,304,588 and based on a schedule of fixed fees, which is being paid on all of these projects of like character, we estimate it is worth a fixed fee to the Government, to have this work performed for $128,865. I would like to ask if such a fee would be entirely satisfactory and acceptable to you gentlemen?

Mr. Dunn: We are delighted to do this work at the fee which you have set up as compensation for same.

Mr. Loving: While we do not anticipate that this Camp will not be built in its entirety, yet I want it clearly understood that there is only $400,000 available at this time and if for unexpected reasons only $400,000 is spent, the fee to be paid you will be paid pro-rata on the same basis as the fee applying to the entire project. The fixed fee mentioned approximates 4.02 per cent of the estimated construction costs and in case only $400,000 is spent, then in settling with you we would expect to pay you an equivalent fixed fee on the amount actually spent. You, of course understand Mr. Dunn, form the questionnaire, that it is not contemplated that any of your executive officers or any member of the firm, if either of you are *are* a partnership, will be paid on a reimbursable basis.

Mr. Dunn: Yes Sir, we understood that.

Mr. Loving: You likewise understand that we have adopted a policy of paying no man on any project in excess of $9,000 or more than he earned last year. However, in determining his present salary recognition will be given to the fact that double shift operations may be required which would result in the man doing twice the normal work that he would do. Under these circumstances I think we would recognize a reasonable increase in his salary, which increases, however, must be approved by the Constructing Quartermaster.

Mr. Dunn: We had understood that.

Mr. Loving: Mr. Dunn, have you handled other work on a cost-plus basis on which you placed your equipment on a rental basis?

Mr. Dunn: Yes, we have done that.

[fol. 119] Mr. Loving: Have you in general followed the rental schedule established by the Associated General Contractors which is recognized and considered by both owners, clients, engineers, architects and suppliers of equipment as being the best standard available at this time.

Mr. Dunn: In general, that has been our rule.

Mr. Loving: In such instances has the lessee of the equipment paid the freight both ways?

Mr. Dunn: Yes, sir.

Mr. Loving: You would expect that in this instance?

Mr. Dunn: Yes sir.

Mr. Loving: There are certain formalities that must be gone through from now on, Mr. Dunn, the first being to secure the clearance of our negotiated agreement by the National Defense Council. It is hoped that this may be accomplished tomorrow and that the contract may be ready for execution, we hope, by tomorrow. Is it your plan to remain in the city until that is accomplished?

Mr. Dunn: If you think it will be done tomorrow, I will be mighty glad to remain in the city. Mr. Hodgson will remain anyway, whether I go home or not. If I go home tomorrow I will return Sunday ni-te and be here Monday morning. I would prefer to do that, but I don't want to delay this. I would like to say that I am subject to your orders or wishes in this matter.

Mr. Loving: Under the conditions we anticipate may arise I think if you are back by Monday morning that will be sufficiently early. Before we adjourn, I want to ask that you

hold this meeting in strict confidence and no not announce to anyone that you have been selected, subject to the approval of the National Defense Council and The Assistant Secretary of War until after the contract has actually been executed.

Mr. Dunn: We will be glad to do that, sir.

EXHIBIT "E"

WBH/SEB

February 8, 1941.

Memorandum To Dunn Construction Company, Inc., John S. Hodgson & Company, Fort McClellan, Alabama.

1. Attached is a list of your Administrative and Field Overhead as of February 1, 1941. With the Project in the finishing stages and with the field force so greatly reduced, it is the opinion of this office that the high price overhead is entirely out of line.

[fol. 120] 2. It is requested that steps be taken to reduce this administrative and field overhead.

(S.) Wm. H. Bell, Jr., Major, Q. M. C., Constructing Quartermaster.

EXHIBIT "F"

DBJ/esh

War Department

Office of the Constructing Quartermaster,
Fort McClellan, Alabama

November 14, 1940.

In Reply Refer to QM 248.

Subject: Over-time for Sheet Metal Workers.

Memorandum to Dunn Construction Co. and John S. Hodgson Co., Fort McClellan, Ala.

1. Due to the severe cold weather and the immediate necessity for heat in such buildings as are now occupied by

troops, and due to the limited number of sheet metal workers available, you are authorized to work sheet metal workers over-time to the extent that is necessary to take care of the present emergency.

For the Constructing Quartermaster.

(S.) Dudley B. Jones, Capt. (FA) Q. M.-Res., Executive Officer.

cc to Mr. Spicer.

Certified a true copy. Thomas H. Doyle, Captain, Q. M. C., Constructing Quartermaster.

EXHIBIT "G"

MPA/SEB

War Department

Office of the Constructing Quartermaster,
Fort McClellan, Alabama

November 12, 1940.

In reply refer to ——.

Dunn Construction Company, Inc., John S. Hodgson & Company, Fort McClellan, Alabama.

1. This is to inform you that all wages with the exception of office help paid for Armistice Day, November 11th, are to be calculated at time and one-half.

[fol. 121] (S.) S. C. MacIntire, Jr., Major, Q. M.-Res., Constructing Quartermaster.

Certified a true copy. Thomas H. Doyle, Captain, Q. M. C., Constructing Quartermaster.

EXHIBIT "H"

Dunn Construction Co., Inc.
And
John S. Hodgson & Co.

Contractors

Fort McClellan, Alabama

February 17, 1941.

Major Wm. H. Bell, Jr., Constructing Quartermaster, Fort McClellan, Alabama.

DEAR SIR:

Permission is hereby requested for electricians to work overtime as of this date to install motor in the Asphalt Plant.

Very truly yours, Dunn Construction Co., Inc., and John S. Hodgson & Company, by (S.) G. H. Stout, Project Manager.

GHS/gp.

Certified a true copy. Thomas H. Doyle, Captain, Q. M. C., Constructing Quartermaster.

EXHIBIT "I"

War Department

Office of the Constructing Quartermaster,
Fort McClellan, Alabama

February 17, 1941.

In reply refer to ——.

Memorandum To Dunn Construction Company, Inc., John S. Hodgson & Company, Fort McClellan, Alabama.

1. You are authorized to work electricians overtime to install the motor in the Asphalt Plant.

(S.) Wm. H. Bell, Jr., Major, Q. M. C., Constructing Quartermaster.

Certified a true copy. Thomas H. Doyle, Captain, Q. M. C., Constructing Quartermaster.

[fol. 122] In Circuit Court of Montgomery County

Order of Submission—June 13, 1941

This cause coming on to be heard, is submitted for final decree upon pleadings and proof as noted by the Register. June 13, 1941.

Walter B. Jones, Judge.

In Circuit Court of Montgomery County

[Title omitted]

Note of Submission—June 13, 1941

Complainant, being called, offers the following testimony, to-wit:

1st. Bill for Declaratory Judgment, and amendment thereto.

2nd. Transcript from Department of Revenue.

3rd. Argeed Statement of Facts.

4th. Testimony of Major S. C. MacIntire, Capt. Thomas H. Doyle and Mr. John S. Hodgson, taken orally before the Court, and exhibits thereto.

Defendant, being also called, offers the following testimony, to-wit:

1st. Demurrer and answer to Bill or Petition as amended.

2nd. Transcript from Department of Revenue.

3rd. Agreed Statement of Facts.

4th. Testimony of Complainant's witnesses on cross-examination, and exhibits thereto.

I hereby certify that the above Note of Testimony is correct, this 13th day of June, A. D. 1941.

Geo. H. Jones, Jr., Register, Thomas D. Samford. United States Attorney, and Hartwell Davis, Assistant United States Attorney, Solicitors for Complainants. Thomas S. Lawson, Attorney General; John W. Lapsley, Assistant Attorney General; Edward Thornton, Assistant Attorney General, Solicitors for Defendant.

[fol. 123] In Circuit Court of Montgomery County

United States of America and Dunn Construction Company, Inc., and John S. Hodgson and Company, Partners Doing Business as Dunn Construction Company, Inc. and John S. Hodgson and Company, Plaintiffs,

vs.

John C. Curry, Individually and as Commissioner of Revenue of the State of Alabama, Defendant

Final Decree—Filed June 13, 1941

This cause coming on to be heard was submitted for a final decree on May 29, 1941, upon the petition for a declaratory judgment, the answer thereto, and the testimony offered on behalf of the plaintiffs and the defendant as noted by the Register, including a written stipulation of facts filed in this cause; and it appearing to the Court that the assessment mentioned in said petition made by the State Department of Revenue of the State of Alabama on May 8, 1941, against Dunn Construction Company, Inc., and John S. Hodgson and Company, for use taxes ascertained and determined to be due by them under the provisions of the Alabama Use Tax Act, Act No. 67 of the General Acts of Alabama, approved February 8, 1939, for the quarterly period beginning January 1, 1941, and ending March 31, 1941, in the aggregate amount of $51.12, including tax, penalty and interest, was validly made; that said plaintiffs, Dunn Construction Company, Inc. and John S. Hodgson and Company are not entitled to a refund of the amount of said assessment paid by them under protest; that neither the levy, assessment nor collection of said tax by the State of Alabama against the said Dunn Construction Company, Inc., and John S. Hodgson and Company, under the facts and circumstances shown in this cause, for the period involved in said assessment, was contrary to any provision, express or implied, of the Constitution of the United States of America, or in violation of any right or immunity of the United States of America; that neither said Dunn Construction Company, Inc., nor said John S. Hodgson and Company, whether acting separately or jointly, was, during the period covered by said assessment, an agent or instrumentality of the United States; nor does it appear that the imposition of said tax constituted a prohibited interference with the performance by them of the contract executed by

and between them and the United States of America, under date of September 9, 1940, and in connection with the per-
[fol. 124] formance of which contract said contractors incurred such tax liability; that neither said act nor said assessment imposed a direct burden upon the United States; and that such burden as is imposed upon the United States with respect to such tax is remote and consequential, for the amount of which the United States expressly agreed to reimburse said contractors as a part of the cost of the construction provided for under the terms of said contract. It is, therefore,

Adjudged, Decreed and Declared That said assessment in the aggregate amount of $51.12 made by the State Department of Revenue of the State of Alabama against Dunn Construction Company, Inc., and John S. Hodgson and Company on the 8th day of May, 1941, under the provisions of the Alabama Use Tax Act, Act No. 67 of the General Acts of Alabama, approved February 8, 1939, for the quarterly period beginning January 1, 1941, and ending March 31, 1941, is legal and valid in all respects, and that said Dunn Construction Company, Inc., and John S. Hodgson and Company were legally liable to the State of Alabama for said taxes, penalty and interest thereon, assessed against them. It is further

Adjudged, Decreed and Declared That said Dunn Construction Company, Inc., and John S. Hodgson and Company are not entitled to a refund of said taxes, penalty, or interest heretofore paid by them under and pursuant to said assessment. It is further

Adjudged, Decreed and Declared That the costs in this cause be paid by the plaintiffs, for which execution may issue.

Done in open court at Montgomery, Alabama, this the 13 day of June, 1941.

Walter B. Jones, Circuit Judge.

[File endorsement omitted.]

IN CIRCUIT COURT OF MONTGOMERY COUNTY

[Title omitted]

NOTICE OF APPEAL—Filed June 16, 1941

Comes now United States of America, and Dunn Construction Company, Inc., and John S. Hodgson and Com-

pany, partners doing business as Dunn Construction Com-
[fol. 125] pany, Inc., and John S. Hodgson and Company, and give notice that an appeal is taken from a decree entered in this cause on June 13, 1941.

This 16th day of June, 1941.

United States of America, and Dunn Construction Company, Inc., and John S. Hodgson and Company, Partners Doing Business as Dunn Construction Company, Inc., and John S. Hodgson and Company, by Thomas D. Samford, United States Attorney.

[File endorsement omitted.]

Security for Costs of Appeal, filed June 16, 1941, omitted in printing.

[fol. 126] Citation in usual form showing service on Thomas S. Lawson, omitted in printing.

[fol. 127] IN CIRCUIT COURT OF MONTGOMERY COUNTY

[Title omitted]

CERTIFICATE OF APPEAL

I, Geo. H. Jones, Jr., Register of the Circuit Court of Montgomery County, Alabama, In Equity, do hereby certify that an appeal was taken in the above stated cause on the 16th day of June, 1941, by the Complainants, from a decree rendered in said cause on the 13th day of June, 1941, to the Supreme Court of the State of Alabama, and that said appeal is made returnable to the present term of said Court.

I further certify that John S. Hodgson and Company, a partnership composed of John S. Hodgson and Alcie J. Hodgson, is principal, and National Surety Corporation, is surety, for the costs of said appeal.

Given under my hand and seal of office, this the 17th day of June, 1941.

Geo. H. Jones, Jr., Register of the Circuit Court of Montgomery County, Alabama, In Equity. (Seal.)

[fol. 128] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 129] IN SUPREME COURT OF ALABAMA

UNITED STATES OF AMERICA and DUNN CONSTRUCTION COMPANY, INC., and John S. Hodgson and Company, Partners Doing Business as Dunn Construction Company, Inc., and John S. Hodgson and Company, Plaintiffs,

v.

JOHN C. CURRY, Individually and as Commissioner of Revenue of the State of Alabama, Defendant

ASSIGNMENT OF ERRORS

The Court erred in holding:

(1) That the assessment made by State of Alabama on May 8th, 1941, against Dunn and Hodgson, as contractors, for use taxes for the quarterly period ending March 31, 1941, was valid.

(2) That said contractors are not entitled to a refund of the amount of said assessment paid under protest.

(3) That neither the levy, assessment nor collection of said tax was contrary to any provision, express or implied, of the Constitution of the United States, or in violation of any right or immunity of the United States.

(4) That neither Dunn nor Hodgson, acting separately or jointly, was an agent or instrumentality of the United States.

(5) That the imposition of said tax did not constitute a prohibited interference with the performance by said contractors of their contract with the United States dated September 9, 1940.

(6) That neither the Alabama statute under which the tax was purportedly levied, nor the said assessment, imposed a direct burden upon the United States.

(7) That such burden as is imposed upon the United States by such tax is remote and consequential.

(8) That the United States has expressly agreed to reimburse the said contractors for such taxes as a part of the cost of the construction provided for under the terms of said contract.

[fol. 130] (9) That said contractors were legally liable for said taxes, penalty and interest.

The Court erred in failing to hold:

(10) That the purchase, storage, use and consumption of the roofing materials involved were by the United States or by said contractors as agents and instrumentalities of the United States, in execution of the said contract September 9, 1940.

(11) That the purchase, storage, use and consumption of the said roofing materials is immune from taxation by the State of Alabama under the Constitution of the United States.

(12) That the purchase, storage, use and consumption of the said roofing materials is exempt from the said tax under Subsection E of Section 3 of Act No. 67 of the General Acts of Alabama, Regular Session, 1939.

(13) That the said roofing materials were stored, used and consumed at Camp McClellan, Anniston, Alabama; that said Camp is within an area within the exclusive jurisdiction of the United States; and that such storage, use and consumption are immune from taxation by the State of Alabama under the Constitution of the United States.

(14) That the State Department of Revenue in applying Act No. 67 aforesaid to the purchase, storage, use and consumption of the said roofing materials have applied Act No. 67 aforesaid in a manner which renders said Act invalid and void under the Constitution of the United States.

(15) That Act No. 67 aforesaid, in so far as it subjects to taxation the purchase, storage, use and consumption of the aforesaid roofing materials, is invalid and void because violative of the Constitution of the United States.

(Signed) Thomas D. Samford, United States Attorney, Attorney for Appellants.

[fol. 131] IN SUPREME COURT OF ALABAMA

[Title omitted]

ORDER OF ARGUMENT AND SUBMISSION—June 23, 1941

Come the parties by attorneys, and argue and submit this cause for decision with 3 Div. No. 351.

[fol. 132] IN SUPREME COURT OF ALABAMA

ORDER CONVENING SPECIAL TERM OF COURT—July 28, 1941.

It is ordered that a Special Term of the Supreme Court of Alabama be begun and held at the Judicial Building in Montgomery, Alabama, on Monday, July 28th, 1941, for the purpose of considering and disposing of any and all matters as the Court may determine, and to continue in session from day to day until adjourned by the Court.

Lucien D. Gardner, Chief Justice. William H. Thomas, Associate Justice. Virgil Bouldin, Associate Justice. Joel B. Brown, Associate Justice. Arthus B. Foster, Associate Justice. — —, ——, Associate Justice. J. Ed. Livingston, Associate Justice.

[fol. 133] In compliance with the foregoing order, a Special Term of the Supreme Court was begun and holden according to law on July 28th, 1941.

Present as Justices of said Court: Chief Justice Gardner and Associate Justices Thomas, Bouldin, Brown, Foster and Livingston. Knight, J., not sitting.

Present as Officers of the Court: Clerk, J. Render Thomas. Marshal, Travis Williams.

The Supreme Court adjourned until Tuesday, July 29th, 1941, at 10 o'clock A. M.

[fol. 134] IN SUPREME COURT OF ALABAMA

3 Div. 350

MONTGOMERY CIRCUIT COURT IN EQUITY

UNITED STATES OF AMERICA and DUNN CONSTRUCTION COMPANY, INC., and JOHN S. HODGSON AND COMPANY, Partners d/b as Dunn Construction Company, Inc., and John S. Hodgson and Company,

vs.

JOHN C. CURRY, Individually, and as Commissioner of Revenue of the State of Alabama

DECREE OF REVERSAL AND RENDITION—July 29, 1941

Come the parties by attorneys, and the record and matters therein assigned for errors, being argued and submitted and duly examined and understood by the Court, it is considered that in the record and proceedings of the Circuit Court there is manifest error. It is therefore considered and ordered that the decree of the Circuit Court be reversed and annulled, and this Court proceeding to render the decree that the Circuit Court should have rendered, doth order, adjudge, decree and declare that the assessment in the aggregate amount of $51.12 made by the State Department of Revenue of the State of Alabama against Dunn Construction Company, Inc., and John S. Hodgson & Company, on the 8th day of May, 1941, under the provisions of the Alabama Use Tax Act, for the quarterly period beginning January 1st, 1941, and ending March 31st, 1941, is illegal and invalid, and that the Appellants are not and were not liable for said taxes so assessed against said Appellants, Dunn Construction Company, Inc., and John S. Hodgson & Company, a Partnership, and that said [fol. 135] Appellants, the said Dunn Construction Company, Inc., and John S. Hodgson & Company, are entitled to a refund of the said tax, penalty and interest paid by them in the aggregate amount of $51.12.

It is also considered, ordered, adjudged and decreed that the costs of appeal of this Court and all of the costs of the Circuit Court be taxed against the Appellee.

[fol. 136] IN THE SUPREME COURT OF ALABAMA

UNITED STATES OF AMERICA ET AL.

v.

JOHN C. CURRY, Commissioner of Revenue

Appeal from Montgomery Circuit Court in Equity

OPINION

LIVINGSTON, Justice.

The questions presented for decision in this case are substantially the same as those discussed and decided in the case of King and Boozer v. State of Alabama—the two cases having been argued and submitted together.

It results therefore that the decree of the lower court is reversed and rendered on the authority of King and Boozer v. State of Alabama, this day decided.

Reversed and rendered.

Gardner, C. J., Thomas, Bouldin and Foster, JJ., concur.

Brown, J., dissents, being of the opinion that the decree of the lower court should be affirmed.

Knight, J., not sitting.

[fol. 137] DISSENTING OPINION

BROWN, Justice, (Dissenting):

The tax levy involved in this case, made by the State Department of Revenue, is not against the government or its instrumentalities, but against Dunn Construction Company, Inc., and John S. Hodgson and Company, independent contractors, operating for profit, under the provisions of Act No. 67, approved February 28, 1939, Acts 1939, pp. 96-109, after the Act of Congress waiving exclusive jurisdiction over Camp McClellan, Anniston, Alabama, in respect to the levy and collection of these taxes, here in controversy.

To quote from the brief filed by the appellant:

"The Dunn Construction Company, Inc., is a corporation organized under the laws of the State of Delaware, with its principal place of business in the State of Alabama at Birmingham, Alabama, in which corporation the United

States owns no interest. John S. Hodgson and Company is a partnership composed of John S. Hodgson and Alice J. Hodgson, both of the City of Birmingham, Alabama."

The said above named parties were under contract with the United States to construct certain buildings at Fort McClellan, and engaged in said contract, to furnish "all labor, *materials*, tools, machinery, equipment facilities *and supplies* necessary for the completion of the work." (Italics supplied.)

The material, the use of which constitutes the basis of the levy, was purchased by said contractors at retail out of the State of Alabama, and shipped into the State for use by said contractors and was used in the performance of their contract with the United States, was paid for by said contractors on their own account, including the tax, and they made claim for a refund on the ground that the levy was in effect a levy of tax against the United States.

Said Act No. 67, in Section II thereof provides:

"An excise tax is hereby imposed on the storage, use or other consumption in this State of tangible personal property purchased at retail on or after the effective date of this act, for storage, use or other consumption in this state at the rate of two per cent (2%) of the sales price of such property, except as provided in subsection (b) of this section." Acts 1939, p. 98, Code 1940, Tit. 51, § 789. [fol. 138] See, National Linen Service Corporation v. State Tax Commission, 237 Ala. 360, 186 So. 478; Durr Drug Co. v. Long, et al., 237 Ala. 689, 188 So. 873; Western Live Stock v. Bureau of Revenue, 303 U. S. 250, 58 S. Ct. 546.

Subsection (b), exempts "property, the storage, use or other consumption of which this state is prohibited from taxing under the constitution or laws of the United States of America or under the constitution of this state."

As before stated, the levy is not against the government or its instrumentalities, but against said contractors operating for private profit, and the contract under which they are operating provides for reimbursement for the costs of the material including taxes for which said contractors are liable. If the United States is liable its liability is contractual, and not by force of the statute.

I am therefore of opinion that the decree of the Circuit Court affirming the levy was free from error, and should be affirmed. I, therefore, respectfully dissent.

[fol. 139] IN THE SUPREME COURT OF ALABAMA

[Title omitted]

PETITION FOR STAY OF DECREE

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of Alabama:

Comes John C. Curry, individually and as Commissioner of Revenue of the State of Alabama, Appellee in the above styled cause, and respectfully shows unto this Court as follows:

1. That on the 29th day of July, 1941, this Court, in the above styled cause, rendered an opinion and entered a final decree reversing the decision and decree of the Circuit Court of Montgomery County, Alabama, In Equity, and rendering a final decree in said cause in favor of Appellants and against this Petitioner.

2. That this Petitioner, being dissatisfied with said final decree, desires and intends to apply to the Supreme Court of the United States for a writ of certiorari to be directed to this Court ordering and directing that the record in this case be certified to it for the purpose of reviewing the same.

3. That said Petitioner is allowed by law three (3) months after the entry of said final decree on the 29th day of July, 1941, in which to make application for such writ.

Wherefore, Petitioner prays that a stay of said decree and the execution and enforcement thereof for a period of three (3) months from the 29th day of July, 1941, or for such further and additional time as may be necessary [fol. 140] to enable the Petitioner to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, be granted by this Court for the purpose of allowing the Petitioner to apply for and obtain such writ; and the Petitioner further prays that the issuance of the certificate to the Circuit Court be stayed during said period, and that if the same has already issued, that it be recalled by this Court.

(Signed) Thomas S. Lawson, Attorney General; John W. Lapsley, Assistant Attorney General; J. Edward Thornton, Assistant Attorney General, Attorneys for Petitioner.

Petition filed and granted this the 2nd day of August, 1941, without bond or security. It is, therefore, ordered that said final decree and the execution and enforcement thereof be and the same is hereby stayed for a period of three months from the 29th day of July, 1941, or for such further and additional time as may be necessary to enable the Petitioner to apply for and obtain a writ of certiorari from the Supreme Court of the United States, and that the certificate be recalled from the Circuit Court during such period.

(Signed) Lucien D. Gardner, Chief Justice of the Supreme Court of Alabama.

I hereby certify that I have this the 2nd day of August, 1941, mailed a copy of the foregoing petition and order, postage prepaid, to Fred L. Blackmon, Esquire, Anniston, Alabama, Samuel O. Clark, Jr., Esquire, Department of Justice, Washington, D. C., Thomas D. Samford, Esquire, Montgomery, Alabama, Attorneys of record for Appellants.

(Signed) John W. Lapsley, Assistant Attorney General.

[fol. 141] IN SUPREME COURT OF ALABAMA

[Title omitted]

ORDER STAYING DECREE—August 2, 1941

Comes the Petitioner, John C. Curry, Individually and as Commissioner of Revenue of the State of Alabama, by attorneys, and the Petition praying that a stay of the decree of the Supreme Court of Alabama and the execution and enforcement thereof for a period of three (3) months from the 29th day of July, 1941, or for such further and additional time as may be necessary to enable Petitioner to apply for and to obtain a Writ of Certiorari from the Supreme Court of the United States, and further praying that the certificate to the Circuit Court, In Equity, be recalled pending application for Writ of Certiorari to the Supreme Court of the United States, being duly examined and understood, it is considered and ordered that the Petition be and the same is hereby granted without bond or

security. It is therefore ordered that the said final decree and the execution and enforcement thereof be and the same is hereby stayed for a period of three (3) months from the 29th day of July, 1941, or for such further and additional time as may be necessary to enable the petitioner to apply for and obtain a Writ of Certiorari from the Supreme Court of the United States, and that the certificate be recalled from the Circuit Court during such period.

(Signed) Lucien D. Gardner, Chief Justice of the Supreme Court of Alabama.

[fol. 142] IN SUPREME COURT OF ALABAMA

CERTIFICATE OF RECALL PENDING APPLICATION FOR CERTIORARI

To the Register of the Circuit Court of Montgomery County, Greeting:

Whereas, in the matter of United States of America, et al., Appellants, vs. John C. Curry, Commissioner of Revenue, Appellee, recently pending in the Supreme Court of Alabama, on appeal from the said Circuit Court of Montgomery County, our Supreme Court did on the 29th day of July, 1941, render a decree of Reversal and Rendition in said cause; and,

Whereas, a certificate of such action of the Supreme Court was duly issued to you, and thereafter a Petition to stay the decree and the execution and enforcement thereof was filed in this Court on the 2nd day of August, 1941: said Petition being granted on said date.

Now, it is hereby certified, that our Supreme Court, or one of the Justices thereof, did, on the 2nd day of August, 1941, order that said certificate be recalled. And you will accordingly return the same to this office at once, together with copy of the opinion in said cause issued to you, pending application for Writ of Certiorari to the Supreme Court of the United States.

Witness, J. Render Thomas, Clerk of the Supreme Court of Alabama, this the 4th day of August, 1941.

(Signed) J. Render Thomas, Clerk of the Supreme Court of Alabama.

[fol. 143] Clerk's Certificate to foregoing transcript omitted in printing.

Endorsed on cover: Enter Thos. S. Lawson, File No. 45,931, Alabama Supreme Court, Term No. 603. John C. Curry, Individually and as Commissioner of Revenue of the State of Alabama, Petitioner vs. The United States of America, Dunn Construction Company, Inc., and John S. Hodgson and Company, Partners Doing Business as Dunn Construction Company, Inc., and John S. Hodgson and Company. Petition for a writ of certiorari and exhibit thereto. Filed September 11, 1941, Term No. 603 O. T., 1941.

[fol. 144] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 13, 1941

The petition herein for a writ of certiorari to the Supreme Court of the State of Alabama is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration and decision of this application.

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